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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1961

No. 653

LAVERE REDFIELD,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI
to the United States Court of Appeals
for the Ninth Circuit

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Petitioner, Lavere Redfield, respectfully prays for a Writ of Certiorari to the United States Court of Appeals, for the Ninth Circuit, in order to review the judgment affirming the order of the United States District Court for the District of Nevada, denying a motion for a new trial after conviction of the petitioner on six counts of an eight-count indictment charging evasion of income taxes, and sentencing peti-

tioner to five years in prison and a $10,000.00 fine on each count, plus costs of suit ($16,060.52). The prison sentence on each count was ordered to run concurrently.

OPINIONS

The opinion of the Trial Court denying the petitioner's motion for a new trial is reported at 197 F. Supp. 559 (March 23, 1961) and may be found in the Appendices to this petition marked "Appendix A". The opinion of the Circuit Court adopting the opinion of the trial Court and affirming the judgment is reported at ..... Fed. ..... (October 16, 1961). A copy of said opinion is included in the Appendices to this petition and marked "Appendix B". (Tr. Vol. II, pages 240-241.)

JURISDICTION

The judgment of the Court of Appeals was entered on October 16, 1961. A copy of said judgment is included in the Appendices to this petition and marked "Appendix C". A petition for rehearing was timely filed in the Court of Appeals, and it was denied on November 13, 1961. (Tr. Vol. II, page 243.) On November 30, 1961, an order issued from this Court extending time to file this Petition for Writ of Certiorari to and including January 12, 1962.

The jurisdiction of the United States Court of Appeals was invoked under 28 U.S.C., Secs. 1291 and 1294.

The jurisdiction of this Court is invoked under Title 28, United States Code, Sec. 1254(1).

QUESTIONS PRESENTED FOR REVIEW

I. Was petitioner compelled by the Trial Court and the prosecution to be a witness against himself in violation of his constitutional privileges against self-incrimination and denial of due process of law?

II. Was petitioner, under the circumstances presented herein, denied Assistance of Counsel?

III. Was petitioner denied a fair and impartial trial and thus, Due Process of Law?

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth and Sixth Amendments to the United States Constitution provide in part as follows:

Fifth Amendment:

> "No person . . . shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property without due process of law . . ."

Sixth Amendment:

> "In all criminal prosecutions, the accused shall enjoy the right . . . to have assistance of Counsel for his Defense."

STATUTORY PROVISIONS

Title 18 of Federal Rules of Criminal Procedure, Rule 44 states as follows:

> "If the defendant appears in Court without counsel, the court shall advise him of his right to counsel and assign counsel to represent him at

every stage of the proceedings unless he elects to proceed without counsel or is able to obtain counsel."

STATEMENT OF THE CASE

On May 26, 1960, the petitioner was indicted by a Federal Grand Jury on an eight-count indictment charging him with income tax evasion under Section 145(b) Internal Revenue Code of 1939; 26 United States Code, 1939 Edition, Section 145(b), and Section 7201, Internal Revenue Code of 1954; 26 United States Code 1954 Edition, Section 7201. (Tr. Vol. IV, pages 2-7.) The jurisdiction of the United States District Court, for the District of Nevada was invoked under the foregoing sections.

Petitioner appeared without counsel at the arraignment and entered a plea of not guilty to each of the separate counts of the indictment. (Tr. Vol. IV, page 10.) Thereafter, Petitioner appeared at every stage of the proceeding including trial and judgment in propria persona as counsel pro se. (Professional counsel was retained after judgment and appeared for Petitioner in his motion for a new trial and thereafter, to the present proceedings.)

A trial by a petit jury resulted in a verdict of guilty as charged on Counts I, II, III, V, VI and VII and not guilty on Counts IV and VIII. The jury trial consumed a period of four weeks and the verdict was returned on October 28, 1960. The guilty verdicts related to the tax years 1953, 1954 and 1955, and the not guilty verdicts related to the tax year 1956. (Vol. I, page 28.)

Although the defense presented sixteen witnesses, *the defendant-petitioner did not take the stand.* (Tr. Vol. III, pages 6-7.)

The objurgations of the Trial Court directed towards this defendant during the course of the trial are discussed and resolved by the Trial Court in its opinion. (Appendix A.)

The testimony of various Internal Revenue Service agents with respect to the petitioner-defendant's refusal to cooperate or answer their questions is set forth in the Appendices to this Petition and labeled "Appendix D".

The argument of the prosecution commenting on the testimony of the Internal Revenue Service agents and the activities of the defendant with regard thereto is set forth in its pertinent parts in "Appendix E" of the Appendices to this Petition.

The following quotations are remarks of the Trial Court made during the course of trial directed towards the defendant-petitioner *not* discussed in the opinions of either the Trial Court or the Court of Appeals. (Appendices A and B.) Additionally, as set forth herein in full, is the cross-examination by the Trial Court of the defendant-petitioner, the defendant not having taken the stand at that, or any other time. All volume, page and line references are to the certified transcript of record on file with this Court:

Remarks of the Trial Court
Directed to the Defendant

Vol. VI, page 790, line 19: "When you want to testify, you take the witness stand."

Vol. VI, page 793, line 10: "If you wish to bring that out, you testify to that."

Vol. VII, page 929, line 2: "You testify when you take the witness chair."

Vol. VII, page 988, line 18: "Well, you can get on the stand and testify to the contrary."

Vol. VIII, page 1269, line 23: "Now, don't testify. If you do, be sworn."

Vol. VIII, page 1377, line 9: "Leave your narration until you take the witness chair."

Vol. VIII, page 1390, line 26: "You can testify to its non-fulfillment when you take the witness stand . . ."

Vol. IX, page 1559, line 17: "You can take the witness chair and testify as to what it was to the contrary."

Vol. IX, page 1563, line 15: "You should testify under oath."

Vol. IX, page 1564, line 20: "You can take the stand and put your witnesses on to do that."

Vol. IX, page 1566, line 3: "Now, Mr. Redfield, I will excuse the witness and you can testify, if you wish."

Vol. IX, page 1566, line 23: "Well, I still think that you should be sworn."

Vol. IX, page 1567, line 1: "Just a second, I think you should be sworn if you are going to so state."

Vol. IX, page 1571, line 5: "Now, let the witness testify. You are going to have all the time you want. I am going to give you a week on that witness chair if you want to take it . . ."

Vol. X, page 1685, line 3: "Now, at this time, do you wish to take the stand? . . ."

Vol. X, page 1685, line 17: "Why don't you clear up a lot of these things by taking the witness chair? . . ."

Vol. X, page 1744, line 15: "We would get a lot further if you would take the stand now, Mr. Redfield."

Cross Examination of the Defendant-Petitioner by the Trial Court

Vol. VII, page 870, line 8, et seq.:

"The Court. Now, just a second counsel [the defendant-petitioner]. I want to ask you a question there. To what specific time and moment do you relate this statement you are making about being a philanthropist?

Mr. Redfield. May of 1953 when I first paid off the note for the brewing company.

The Court. In '53?

Mr. Redfield. Yes.

The Court. At that time you agreed that there would be no interest?

Mr. Redfield. Yes, sir.

By Mr. Redfield:

Q. That is true, is it not?

A. Yes, it is.

The Court. That was the time you took the trust deed on all the corporate property?

Mr. Redfield. Took an assignment from the bank, your Honor.

The Court. And you took another assignment of the trust deed security?

Mr. Redfield. And the notes.

The Witness. The interest shown on the notes, but he told us we wouldn't have to worry about the interest for the year, just to try to get the principal paid off, if possible.

By Mr. Redfield:

Q. At the time I paid the notes to the bank, necessarily I had to pay the bank their principal and interest, but there would be no interest coming to me after having paid off those notes; is that true.

A. That is right.

The Court. Now, getting back to the second question of your advancing funds, at which time you took a deed to the real property and a bill of sale to the personal property, I assume that you mean the property of the corporation?

Mr. Redfield. Yes, your Honor.

The Court. So at all times the transactions were actually between you, as an individual, and the Reno Brewing Company as a corporation?

Mr. Redfield. That is so.

The Court. That is all I wanted to know. I wanted to be clear on that point."

No specific instructions were given to the jury at the conclusion of any of the above quoted remarks nor was any explanation or instructions given with

respect to the above quoted cross-examination when it was completed.

After serving approximately six months of the jail sentence imposed, petitioner was released on bail. Execution of the jail sentence has been stayed pending the outcome of this Petition.

POINTS AND AUTHORITIES IN SUPPORT OF PETITION

I

PETITIONER WAS COMPELLED TO BE A WITNESS AGAINST HIMSELF IN VIOLATION OF HIS PRIVILEGE AGAINST SELF-INCRIMINATION AND RIGHTS TO DUE PROCESS OF LAW.

The Statement of the Case, supra, is replete with quotations from the trial transcript indicating that:

A. The Trial Court constantly told, asked and suggested that the petitioner take the witness stand;

B. The Trial Court stated that the petitioner had a right to take the witness stand;

C. The Trial Court cross examined the petitioner while the petitioner was cross examining a government witness.

D. Appendices "C" and "D" show that the prosecution introduced evidence to the effect that petitioner failed to answer pre-trial questions of, and otherwise cooperate with, government investigators, and did then proceed to comment to the jury during closing argument on the petitioner's said failure.

A fact which should be of particular interest to this Court is that relatively little case law exists with respect to the particular prohibited conduct engaged in by the Trial Court and the prosecution. However, the small body of case law specifically in point entirely and unequivocally supports the proposition that petitioner's privilege against self-incrimination has been violated.

The philosophy of the Courts in strictly upholding the *privilege against self-incrimination* is stated in the oft-cited case of *McKnight v. United States* (6th Cir. 1902) 115 Fed. 972, 981, by Justice Day when he was sitting as a Circuit Judge,

> "A perusal of the decisions of the Supreme Court shows that no constitutional right has been the subject of more jealous care than that which protects one accused of crime from being compelled to give testimony against himself."

In line with this extreme solicitude exercised by the Courts in protecting this most basic and essential right, it matters not that a violation of the right be slight or aggravated (as in in the instant case). As was stated by Justice Bradley in the landmark decision of *Boyd v. United States*, 116 U.S. 616, 26 L. Ed. 746,

> "It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely: by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of

person and property should be liberally construed. A close and liberal construction deprives them of half their efficacy and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of the courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon. Their motto should be *obsta principiis.*"

A. It is a violation of the privilege to tell a defendant to take the witness stand, or even suggest that he take the witness stand, in the presence of the jury.

In the Statement of the Case, supra, petitioner has cited seventeen (17) instances wherein the Trial Court either directed the petitioner-defendant to take the witness stand or suggested that he be sworn.

In *United States v. Hamilton* (D.C.S.D. W.Va., 1951), 97 F. Supp. 123, wherein the Trial Judge, in open Court, asked the defendant who was represented by counsel to admit or deny that his handwriting appeared on certain documents, the same Trial Judge, in granting defendant's Motion to Vacate Sentence And Conviction, stated at page 127:

> "Objective consideration of the Court's statement in the presence of the jury leaves no room for doubt that it was a breach of the privilege given to Hamilton [the defendant] by the Fifth Amendment to the Constitution of the United States. . . . The leading case of *McKnight v. United States*, 6th Cir., 115 F. 972 makes it clear that *actual compulsion is not essential, but that the right is violated by any official suggestion that a defendant take the stand or make admissions.* See

Boyd v. United States, 116 U.S. 616, 29 L. Ed. 746."[1] (Emphasis added.)

In *United States v. Lawn* (D.C.S.D. N.Y., 1953), 115 F. Supp. 674, the law was stated by Judge Goddard to be as follows:

> "It is thus improper to call him [the defendant in a criminal case] without a request on his part. 8 Wigmore on Evidence, 3rd Edit., p. 393; 3 Wharton's Criminal Evidence, 11th Edit. p. 1960."[2]

In the leading cases of *Boyd v. United States, supra,*[3] and *McKnight v. United States, supra,* the respective trial Courts therein called upon the defendants to produce documentary evidence. This is exactly

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[1]Though the Court found that its statement constituted error, it held that the error was not prejudicial, in that the jury, both at the time the statement was made and later in the Court's instructions, were told not to draw any unfavorable inferences from the defendant's failure to comply with the Court's request. The actual ground for the granting of the motion was the prosecuting attorney's error in commenting on the defendant's failure to testify.

[2]In *Lawn*, the defendant after an indictment had been filed against him, was subpoenaed by the Grand Jury to testify against himself. After testifying, a new indictment was filed against him and the defendant moved Judge Goddard to quash the indictment on the ground that his privilege against self-incrimination had been violated. Judge Goddard held that once an information is filed, the individual achieves the status of an "accused" and cannot be called to testify unless he requests to testify.

[3]In *Boyd*, the Court had under consideration a section of the customs revenue laws of the United States authorizing a Court of the United States to require the production of books, invoices and papers in Court, or else the allegations of the prosecuting attorney regarding the contents of said documents are to be taken as confessed; it was held that this portion of the act was unconstitutional as applied to suits for penalties and forfeitures of the parties' goods as being repugnant to the Fourth and Fifth Amendments.

the same as telling such a defendant to take the witness stand and produce testimonial evidence. In each of these cases, such conduct on the part of the Trial Court was held to be clearly violative of the defendants' privilege against self-incrimination.

In the *McKnight* case, the Court stated,

> "In the present case, the accused, in the presence of the jury, was, by direction of the court, called upon to produce the document. . . . The production of such a paper would have been self-incriminating to the defendant in the highest degree. It is true, the learned judge made no order requiring its production; but the accused, by the demand made upon him before the jury, after proof tending to show his possession of the document, was required either to produce it, deny or explain his possession of the writing, or by his very silence permit inferences to be drawn against him quite as prejudicial as positive testimony would be. Nor were the jury advised that the nonproduction of the writing afforded no ground for an inference of guilt. We think this procedure was an infraction of the constitutional rights of the accused, within the meaning of the fifth amendment to the constitution."

United States v. Housing Foundation (3rd Cir., 1949), 176 F. 2d 665, involved the criminal trial of two defendants for using the mails to defraud. At the beginning of the defendants' case, counsel for one of the defendants called to the stand the other defendant, Mr. Westfield, and made him testify over the objection of his counsel. The judgment of conviction of defendant Westfield who had been forced to testify

was reversed notwithstanding that the trial judge had said testimony stricken from the record and cautioned the jury not to consider the same and not to draw any presumptions from said defendants' failure to testify. Judge Goodrich, speaking for the 3rd Circuit, stated at page 665,

> "That there was ample evidence to sustain the conviction there is not the slightest doubt."

However, Judge Goodrich, on page 666, went on to state as follows:

> "Compelling the defendant Westfield to take the stand and to testify in a criminal prosecution against himself is so fundamental an error that the judgment must be reversed and a new trial ordered as to Westfield. [Citing: *Boyd v. United States, supra, Councelman v. Hitchcock,* 142 U.S. 547, 562, 35 L. Ed. 1110, and *United States v. Sprengle,* 3rd Cir. 1939, 103 F. 2nd 876, 883]. The error made arises from confusing the privilege of any witness not to give incriminating answers with the right of the accused not to take the stand in a criminal prosecution against himself. Both come within the protection of the 5th Amendment. . . . The plain difference between the privilege of witness and accused is that the latter may not be required to take the stand at all. We need only say in this case that the accused was required to take the stand and to testify over his objection and in violation of his right protected both by the Constitution and the common law."

B. It is even a violation of the privilege to state in the presence of the jury that the defendant in a criminal case has the right to take the witness stand.

Of the seventeen examples set out in the Statement of the Case, supra, seven of those remarks were violative of this particular aspect of the Privilege (unnumbered examples 2, 4, 7, 8, 10, 11, 14).

The *McKnight case, supra,* involved the additional error of the Trial Court stating to the defendant's attorney, in the presence of the jury, that the defendant had a right to take the witness stand.[4]

The Court of Appeals for the Sixth Circuit held at page 982 that,

> "The reference to the right of the defendant to testify where he does not see fit to avail himself of the privilege [to testify] puts him in a position where the jury will draw inferences against him from his silence, and the statute [18 U.S.C.A. 3481] which was intended as a shield for protection will be turned into a weapon of attack in establishing guilt."

The Court went on to state,

> "Nor does it make any difference that the defendant afterward testified. As has been said in

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[4] "The Court. That is a question of proof, entirely. Counsel cannot testify for the defendant.

Col. Breckinridge. No one can make answer for the defendant but the defendant himself.

The Court. He can testify in rebuttal to this proposition.

Col. Breckinridge. He can do more than that, and we object to the statement as to his right to testify.

The Court. I did not mean he could testify in person, but he can introduce testimony in rebuttal of the proposition."

Thereupon, the jury was told by the Court to disregard the Court's statement.

> some authorities, after allusion has once been made to the right of the defendant to testify, the accused is virtually driven upon the stand, or remains off at the peril of having inferences drawn against him for his silence, when the law gives him a right not to speak."

As indicated in the foregoing quotation, it is irrelevant that a defendant take the witness stand once the error has been committed. It follows, therefore, that a violation of the constitutional privilege against self-incrimination becomes even more pronounced and flagrant, as in the instant case, where the defendant appearing pro se did not take the stand in his defense.

C. It is a violation of the privilege for the trial Court to question a criminal defendant appearing pro se since this compels the defendant to become a witness against himself.

Petitioner, after a diligent search, has been able to locate only one case discussing this exact point. Although it is a state Court case decided by the Supreme Judicial Court of Massachusetts, the similarity of facts and the application of law to the instant case is uncanny. (The defendant there appeared pro se and was questioned by the Trial Court while the defendant was cross examining witnesses.) In that case of *Brown v. Commonwealth*, 335 Mass. 476, 483, 140 N.E. 2d 461, 465 (1957). Chief Justice Wilkins delivered an extremely well-reasoned and considered opinion and held in part:

> "Likewise, we think that the questions asked by the Judge of the petitioner while he was cross examining a witness in effect made him a witness,

or forced him to make admissions, and, however viewed, were violative of the privilege against self-incrimination."

D. It is a violation of the privilege against self-incrimination for the prosecution in a criminal case to introduce evidence concerning a defendant's failure to answer government investigators' pre-trial questions or evidence of a defendant's failure to cooperate, and then comment on such a failure.

In Appendix "D" to this Petition, petitioner has set forth excerpts of testimony of three government investigators wherein the prosecution solicited testimony that the petitioner-defendant had prior to trial either refused to answer the questions of these investigators or had in other ways refused to cooperate with them. Appendix "E" sets forth the comments of the prosecution on this testimony.

In *United States v. Sprengel* (3rd Cir. 1939), 103 F. 2d 876, 883, defendant was charged with conspiracy to defraud through the mails. A postal inspector testified for the prosecution that questionnaires had been sent to the defendant and had not been answered. The prosecution then proceeded to comment to the jury on the defendant's failure to answer the questionnaires.

The Court in reversing the judgment of conviction stated.

> "We think that this matter also constituted prejudicial error to the appellants. The law is well settled that a defendant cannot be compelled to testify against himself and that a prosecuting attorney may not comment upon his failure to so testify. The question presented by this aspect of

> the case at bar is closely analogous. The appellants were not compelled by law to respond to the questionnaires of the Post Office Department and the fact that they did not do so does not present evidence that they acted in bad faith or were not acting in good faith. *Boyd v. United States,* 116 U.S. 616, 6 S. Ct. 524, 29 L. Ed. 746; *McKnight v. United States,* 6 Cir., 115 F. 972."

This same result, based on the same reasoning, was reached by the Court in *Hilton v. United States* (5th Cir. 1955), 221 F. 2d 338, a narcotics case, wherein, over the objection of defense counsel, the prosecution was permitted to introduce testimony that the defendant had been given an opportunity to explain the presence of narcotics on his premises, and had refused to do so.

In summation, petitioner can only point out that each of the four instances cited above, if taken separately, would have been sufficient to secure a reversal of the conviction. A combination of all four produces error of such magnitude that it is almost incredible that the violation of the Privilege against Self-Incrimination and the resultant denial of Due Process of Law were not passed upon nor commented on either by the Trial Court in its opinion (Appendix "A") denying petitioner's Motion for New Trial or in the opinion of the Court of Appeals (Appendix "B") which "adopted" the Trial Court's opinion in its entirety.

II

THE PETITIONER WAS DENIED ASSISTANCE OF COUNSEL AND DUE PROCESS OF LAW IN VIOLATION OF THE SIXTH AND FIFTH AMENDMENTS TO THE UNITED STATES CONSTITUTION THROUGH THE TRIAL COURT'S FAILURE TO EXERCISE ITS DUTY TO INQUIRE INTO, AND ADVISE ON, PETITIONER'S WAIVER OF COUNSEL.

The subject matter discussed under this broad heading concerns itself with two novel points never before directly dealt with in any case so far as can be ascertained. The conclusions reached and the contentions propounded are arrived at through a series of inductive inferences. By its very nature, the exponation must either be extremely brief, leaving the connotations to the reader's experience, or cumbersome to the point of boredom. An attempt will be made to be brief.

The ingredients of the present potage are worthy of note:

1. A complicated (90 witnesses and 469 documents) for the government criminal prosecution.

2. An unusual but seemingly "intelligent waiver" of counsel by a wealthy defendant.

3. Inexperience and ineptness of a defendant appearing pro se in the conduct of a criminal defense becoming apparent in the early stages of the trial.

4. An explanation, after conviction, for the defendant's unusual waiver of counsel.

5. An assessment against the defendant for "costs of prosecution" in the sum of $16,060.52.

The blending of these factors produced the following results:

1. Constant chidings and scoldings of, and an attitude of impatience and annoyance with the defendant by the Trial Court, in the presence of the jury.

2. An inept and inadequate defense.

3. Inadvertent but egregious error by a highly learned and competent Trial Court (see discussion, supra, re self-incrimination).

4. Inadvertent but egregious error on the part of able government attorneys in the presentation of their case and in their closing argument. (See "self-incrimination," supra).

It is petitioner's contention that under the peculiar facts and circumstances of the instant case, the Trial Court, at the time of arraignment, had the affirmative duty of inquiring into the reason for the unusual waiver of counsel and had the further affirmative duty to advise the petitioner-defendant that it was imperative that he have counsel for his defense; *that if the defendant was concerned with the cost of the defense that the court would appoint an attorney to represent the defendant, and that if the defendant lost the case, the costs of the prosecution and the appointed counsel would be taxed against him, and if the defendant were acquitted, there would be no cost.*

Secondly, it is petitioner's contention that assuming arguendo, that the Trial Court did not have the affirmative duty to so advise the petitioner-defendant at the time of arraignment, that it did have that duty during the initial stages of the trial proceedings when the necessity for effective counsel for the defendant-

petitioner became so overwhelmingly apparent that the Trial Court was put on notice that the previous waiver of counsel had not been "intelligent".

It is respectfully suggested that the above two contentions are both supported inferentially by constitutional and case law, and that in fact, in the instant case, the Trial Court's jurisdiction was lost either at the arraignment or early in the trial.

The italicized portion of petitioner's first contention is admittedly a strong statement regarding the duty of the Trial Court in the instant case. But since ". . . the determination of whether there has been an intelligent waiver of the right to counsel must depend, in each case, upon the particular facts and circumstances surrounding that case, including the background, experience and conduct of the accused . . ." the defendant's circumstances and the fact that costs of prosecution are taxable and were taxed against the defendant-petitioner must be considered.

There is no question, as was pointed out by the Trial Court in its opinion (Appendix A), that the Court explained the complicated nature of the proceedings to the defendant; ascertained that the defendant was able to employ counsel; and *offered to appoint counsel,* all of which was rejected by the defendant-petitioner. However, as the Court there pointed out it was not necessary to appoint counsel, "Since defendant was able to retain counsel. . . . See Rule 44, Federal Rules of Criminal Procedure ('If the defendant appears in court without counsel, the court shall advise him of his right to counsel and

assign counsel to represent him at every stage of the proceeding *unless he elects to proceed without counsel or is able to obtain counsel.'*) . . ." The emphasis was supplied by the court.

It is respectfully suggested that the dictum of the Trial Court, and in fact Rule 44 on which the court relied, results in a total emasculation of the mandate of the Sixth Amendment and the due proces provisions implicit therein. Constitutional guarantees have always extended equally to the rich and the poor.[5]

As was pointed out earlier, each case must rest on its own particular facts and circumstances, and one of the circumstances of the instant case was that the defendant-petitioner was actually taxed costs of $16,060.52 by the Trial Court.

Section 7201 of the Internal Revenue Code of 1954 under which defendant was indicted and convicted provides for the criminal penalty and *"costs of prosecution"* to be assessed against the defendant. So does Title 28, Section 1918(b): "Whenever any conviction for any offense not capital is obtained in a District

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[5]The notes of the advisory committee on Rules to Rule 44 state: "This rule is a restatement of existing law in regard to the defendant's constitutional right of counsel as defined in recent judicial decisions . . . .

"18 U.S.C.A. Sec. 3005, formerly Sec. 563, which was derived from the act of April 30, 1790 (1 Stat. 118), provided:

"'Every person who is indicted of treason or other capital crime, shall be allowed to make his full defense by counsel learned in the law; and the court before which he is tried or some judge thereof, shall immediately, upon his request, assign to him such counsel, not exceeding two, as he may desire and they shall have free access to him at all seasonable hours.'"

Court, the Court may order defendant to pay the costs of prosecution."

The Trial Court determined that the defendant was financially able to employ counsel. It also inquired as to whether the defendant desired to retain counsel. On the other hand, it neglected to inquire as to the reason for defendant's refusal to employ counsel and further neglected to inform defendant that in the event he was found guilty, he would have to pay the costs of prosecution, and that counsel could be appointed for him on the basis that he would pay for said counsel if convicted and pay nothing if acquitted.

If the Court had the duty [See discussion, infra] to inquire into defendant's reason for waiver, and the defendant's reason was then expressed as it was explained after conviction, than petitioner contends that it would have been the affirmative duty of the Court where the defendant was a wealthy man to persuade the defendant to secure Court-appointed counsel with the clear understanding that the costs of that counsel would be assessed against him if he were convicted. This would be consistent with the defendant's expression of innocence and his reluctance to incur the expense of proving it. It is further consistent with the case of *Knox County Counsel v. State ex rel. McCormick*[6] wherein the Court held that it is a violation of the Constitution to require attorneys to prosecute and defend criminal cases without

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[6]*Knox County Counsel v. State ex rel. McCormick*, 1940, 29 N.E. 2d 405, 27 Ind. 493, 130 A.L.R. 1437.

fees. The latter case cites with approval *Johnson v. Zerbst*,[7] and *Powell, et al., v. State*.[8]

* * *

The Sixth Amendment to the United States Constitution is an essential jurisdictional prerequisite to a Federal Court's authority to deprive an accused of life or liberty. If the accused is not represented by counsel and has not competently and intelligently waived his constitutional right, there is a jurisdictional bar to a valid conviction. The Trial Court's jurisdiction at the beginning of the trial may be lost in the course of the proceedings due to the failure of the Court to obtain counsel for one who has not intelligently waived this constitutional guaranty.[9]

The constitutional right of an accused to be represented by counsel "imposes the serious and weighty responsibility upon the trial judge of determining whether there is an intelligent and competent waiver by the accused. Whether there is a proper waiver should be clearly determined by the Trial Court, and it would be fitting and appropriate for that determination to appear upon the record."[10]

Defendant-petitioner, on motion for new trial, pointed out through the affidavits of Drs. Brown and Toller, psychiatrists, (Tr. Vol. 1, pages 62, 68), that

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[7]*Johnson v. Zerbst, Warden* (1938), 304 U.S. 458, 82 L. Ed. 1461.

[8]*Powell et al. v. State* (1932), 287 U.S. 45, 77 L. Ed. 158, 84 A.L.R. 527.

[9]*Johnson v. Zerbst, Warden, supra.*

[10]*Johnson v. Zerbst, Warden, supra.*

in essence defendant-petitioner was obsessed with money; that he had a compulsion to make money; and that money assumed more than natural proportions to him. "In short, both men seem to agree that somehow or other the decision to waive counsel was motivated by an inner desire to save money." (Opinion, Appendix A.)

In the same opinion, the Trial Court discusses the defendant's explanation for the waiver of counsel. The defendant said he thought he was innocent and the jury would acquit, and that employing counsel would therefore be an expensive and idle act. The explanation was rejected by the Trial Court on the ad hoc basis that (1) the defendant knew what he was charged with and (2) was found guilty by a jury of "wilfully" evading taxes and therefore defendant was "not a man who [could] honestly say that he [knew he was] innocent."

The Court's theory (note 3, Appendix A) was that the defendant was so wily and experienced an advocate in the field of law, and knew so much more than he could have been willing or able to divulge to his attorney, that he took a chance on befuddling at least one juror so that the jury would be "hung". "We have grave doubts that most lawyers could gain sufficient familiarity with what had transpired so as to be able to effectively combat the government's case," said the Trial Court.

Possibly, the Court's duty of inquiry in the instant case arose either at the arraignment or at one or more of the proceedings *prior* to the trial itself. As admit-

ted by the Trial Court in its opinion (Appendix A), the instant case was complicated. Further, the defendant was a wealthy man undoubtedly in a financial position to obtain counsel who boldly stated to the Court that he would represent himself. The situation presented to the Court was so highly unusual as to recommend itself to the Court that a further inquiry into the situation would be needed. "The Sixth Amendment . . . embodies a realistic recognition of the obvious truth that the average defendant does not have the professional legal skill to protect himself when brought before a tribunal with power to take his life or liberty wherein the prosecution is presented by experienced and learned Counsel. That which is simple, orderly and necessary to the lawyer—to the untrained layman—may appear intricate, complex and mysterious. . . . Even the intelligent and educated layman has small and sometimes no skill in the science of law. . . . He lacks both skill and knowledge adequately to prepare his defense, even though he has a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. . . ."[11]

Assuming arguendo, that the foregoing contention of petitioner with respect to the pre-trial duty of the judge was not clearly present in the instant case due to the possible absence of indication that the defendant was not competent to represent himself—("when he [the defendant-petitioner] stated, 'I feel I am competent to defend myself.' . . . he did so with that

[11] *Johnson v. Zerbst, Warden, supra.*

convincingness that comes from the totally rational man who speaks with a soft voice. At all times relevant to the matter now under inquiry, he was alert, courteous and determined," said the Trial Court in its Opinion, Appendix A)--then certainly, the subsequent conduct of the defendant after the commencement of the trial was totally inconsonant with what the Trial Court had been led to believe and was of such a nature that any reasonable person would have been alerted to the fact that something was wrong. The extensive footnotes in the Trial Court's Opinion indicate the problem confronting the Court.

From a reading of the Trial Court's Opinion, it is abundantly clear that somewhere in the early stages of the trial[12] the Court was faced with an anomalous,

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[12]Transcript Vol. VI, page 784, line 14:

"Mr. Redfield. Your Honor, I have never heard such a portrayal . . .

The Court. Now, Mr. Redfield, I will tolerate no comments from you concerning the behavior of anyone in this courtroom. That is the privilege of this Court. If you wish to cross examine this witness, be about your business.

Mr. Redfield. Well, your Honor, there is——

The Court. Don't address me. Cross examine the witness if you wish to exercise your right of cross examination . . ."

Page 790, line 21, et seq.

"Mr. Redfield. Well, it is difficult for me to see how to do this [With respect to cross examining the witness.]

The Court. Well, that difficulty should have been considered by you before you decided to represent yourself. It is no fault of the Court's and I don't want any intimation from you that anyone put you in this position. You are in this position voluntarily.

Mr. Redfield. Yes, but the facts are that they are just the opposite to what he has testified to . . ."

The above-quoted incident began at the cross examination of the witness Harold S. Chisholm. This witness, as it transpired, had been a losing defendant in a previous lawsuit where petitioner was a plaintiff. A reading of the transcript indicates that the event

if not incredible situation. An extremely wealthy defendant who had previously seemingly intelligently waived his right to counsel was conducting the defense of a serious and complicated criminal prosecution in a manner which euphemistically could be referred to as incompetent.

The Trial Court explains its tergiversation from the mandates of the Fifth and Sixth Amendments and the *Johnson case, supra,*[13] by citing the Ninth Circuit case of *Burstein v. The United States*[14] for the proposition that the defendant was not denied a fair trial merely because the "judge refrained from intermeddling". It is true that a Federal Trial Judge

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and subsequent fireworks started in the middle of the afternoon of October 11, 1960.

Trial had commenced on October 4, 1960, and up to that time approximately twenty-four hours of actual trial time had elapsed. During this time, the government had called sixty witnesses and introduced 366 exhibits in evidence for an amazing average of twenty-four minutes per witness and one exhibit every four minutes! The defendant had offered no objection to the exhibits and had not cross examined the witnesses called to introduce the exhibits except in one instance where a perfunctory (less than a page) cross examination was had.

In line with this and with the large costs of prosecution taxed against the petitioner, it might be noted that at Vol. V, page 312 et seq. (just prior to the introduction of Exhibit #93), petitioner offered to stipulate "that the plaintiff in this case can introduce any records, anything in the way of evidence that they have for the years under which I am indicted, and I have no objection to the introduction of anything whatsoever . . ." this offer was rejected by the Government. The Court commented at page 314 after petitioner's offer had been made that had the petitioner had counsel, this probably could have been taken care of before trial, but that the slow process of calling numerous witnesses from all over the United States was out of solicitude for the petitioner-defendant.

[13]304 U.S. 458, 82 L. Ed. 1461.

[14]*Burstein v. United States,* (9th Cir. 1949) 178 Fed. 2d 665, 670.

is not relegated to the position of a mere moderator,[15] and certainly his position should be less than a participant,[16] but we cannot agree that "intermeddling" equates to ignoring the obvious and/or denying an accused his Constitutional Guaranties.[17] "It may well be that solicitude for the essential rights of an accused require the Trial Judge to cross-examine government witnesses when an accused with no capacity to protect his rights insists upon conducting his own defense, or when an accused is represented by wholly inadequate counsel."[18]

Hindsight is always clearer than foresight. When defendant-petitioner retained counsel to present a good faith motion for new trial, the Trial Court was presented with an explanation as to the unusual waiver of counsel. The Court was then asked to view in retrospect the course of its own and the defendant's conduct during trial, and the doubt was resolved against the defendant.

The only logical conclusion that can be reached from a reading of the authorities cited herein is that the Trial Court had an affirmative duty to see that

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[15] *Quercia v. United States* (1933), 289 U.S. 466, 469, 289 L. Ed. 1321.

[16] *In the Matter of the United States of America* (1st Cir. 1961) 286 Fed. 2d 556.

[17] "Moreover, upon his [the Trial Court's] shoulders rests the duty to see that the trial is conducted with solicitude for the basic and essential rights of the accused."

In the Matter of the United States of America, supra. (1st Cir. 1961) 286 Fed. 2d 556.

Glasser v. United States, 315 U.S. 60, 71, 86 L. Ed. 680.

[18] *In the Matter of the United States of America, supra.*

defendant was given effective Assistance of Counsel, and this duty extended to the point of inquiring as to whether an intelligent waiver of counsel had been made—either prior to trial when unusual circumstances were presented to the Court—or during the course of trial when the defendant patently had "no capacity to protect his rights".

When a Court or an officer of the Court has knowledge requiring the exercise of a duty on the accused's behalf, its failure to exercise such a duty constitutes a denial of "due process of law."

Robinson v. Johnston, D. C. Cal. 1943, 50 F. Supp. 774;

Johnson v. Zerbst, supra, 304 U.S. 458, 82 L. Ed. 1461.

III

PETITIONER WAS DENIED A FAIR AND IMPARTIAL TRIAL AND THUS DUE PROCESS OF LAW.

It has been shown herein that the remarks and comments of the Trial Court with respect to the defendant's testifying have been a violation of his privilege against Self-Incrimination and Due Process of Law under the Fifth Amendment to the United States Constitution.

In combination with, and in addition to, the quoted remarks made by the Trial Court violating defendant-petitioner's privilege against Self-Incrimination, other remarks of the Court during the course of the

trial[19] made in the presence of the jury were of such a nature as to deny petitioner a fair and impartial trial and Due Process of Law.

Fair play is also an essence of "due process".

Galvan v. Press, 1954, 347 U.S. 522, 98 L. Ed. 911, Rehearing den. 348 U.S. 852, 999 L. Ed. 671.

In the case of *United States v. Ah Kee Eng* (2d Cir.) 241 Fed. 2d 157, 62 A.L.R. 2d 159, the Court found, among other things, reversible error in the conduct of the Trial Judge, namely the prejudicial nature of the Trial Judge's treatment of defense counsel and the defense throughout the trial. The Appellate Court found in the record that in numerous instances, the Trial Judge had "exhibited an attitude of impatience, and an annoyance at proper objections and interruptions as if they were captious, absurd or unnecessary", and "occasionally the Judge made gratuitous comments disparaging the defense counsel and the defense".

The opinion of Judge Lumbard in that case represents the opinion of petitioner herein: "While the Trial Judge should be permitted considerable latitude in dealing with counsel, ruling on objections, and

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[19]Some examples in the instant case of statements by the Court to the defendant-petitioner in the presence of the jury:

Tr. Vol. VI, page 799:

"I don't propose to have you impose on the jury by standing there hour after hour indicating how stupid you are . . ."

Tr. Vol. VIII, page 1384:

". . . Just because you want to be your own attorney, that doesn't mean that the bars of procedure are down and you can conduct this like you would a Piute Powwow."

keeping the trial moving, he must not forget that the jury hangs on his every word and is most attentive to any indication of his view of the proceedings. Thus, repeated indications of impatience and displeasure of such nature to indicate that the Judge thinks little of counsel's intelligence and what he is doing are most damaging to a fair presentation of the defense. . . ."

CONCLUSION

For the reasons herein stated, petitioner respectfully urges that his Petition for Writ of Certiorari should be granted.

Dated, January 2, 1962.

Respectfully submitted,
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(Appendices A, B, C, D and E are filed herewith in a separate volume)